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# Property

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# PROPERTY

by

Joe A. Stalcup\* and J. McDonald Williams\*\*

## I. DISCRIMINATION IN HOUSING

ANY REVIEW of the developments in property law for the past year must begin at the federal level. In recent years Congress and the courts have increasingly sought to recognize and protect personal and property rights from private as well as public discrimination. The question of private discrimination in the sale or rental of real property, however, has received little attention. In *Jones v. Mayer*<sup>1</sup> a Negro family sought injunctive and other relief against a white homeowner who refused to sell them a home for the sole reason that they were Negroes. At issue was an obscure federal statute which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."<sup>2</sup> The United States Supreme Court, declaring that the statute was a valid exercise of congressional authority to enforce the thirteenth amendment, held that the statute "bars *all* racial discrimination, private as well as public, in the sale or rental of property."<sup>3</sup> Acknowledging that the statute deals only with racial discrimination and does not speak to discrimination because of religion or national origin, the Court noted that the case does not preempt the Fair Housing Act<sup>4</sup> which was recently passed by Congress.

The Fair Housing Act has a much broader application than *Jones v. Mayer*. Its principal thrust is to make unlawful the refusal to sell or rent, or the refusal to negotiate as to the sale or rental of, a dwelling to any person because of race, color, religion or national origin.<sup>5</sup> However, the Act also proscribes (1) advertising of the sale or rental of a dwelling that indicates any preference or discrimination based on race, color, religion or national origin,<sup>6</sup> (2) representing to the prospective purchaser or lessee, because of his race, color, religion or national origin, that a dwelling is unavailable for sale or rental, when such dwelling is in fact available,<sup>7</sup> and (3) "block busting" for profit.<sup>8</sup> Finally, the Act prohibits discrimination in the financing of housing<sup>9</sup> and related brokerage services.<sup>10</sup>

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<sup>1</sup> 392 U.S. 409 (1968).

<sup>2</sup> 42 U.S.C. § 1982 (1964).

<sup>3</sup> 392 U.S. at 413.

<sup>4</sup> 42 U.S.C.A. §§ 3601-3619, 3631 (Supp. 1968).

<sup>5</sup> *Id.* § 3604(a).

<sup>6</sup> *Id.* § 3604(c).

<sup>7</sup> *Id.* § 3604(d).

<sup>8</sup> *Id.* § 3604(e). "Block busting" is inducing a homeowner to sell or rent his dwelling by making representations about the prospective entry into a neighborhood of persons of a particular race, color, religion or national origin.

<sup>9</sup> *Id.* § 3605.

<sup>10</sup> *Id.* § 3606.

There are several exemptions to the coverage of the Act, including a single-family house sold or rented by its owner provided that (1) the owner does not own more than three such houses at any one time, (2) if the owner does not reside in the house, the exemption is available only to one sale in a two-year period, and (3) the house is sold or rented without the use of a broker and without advertising the discriminatory policy.<sup>11</sup> The Act also exempts rooms in dwellings containing living quarters to be occupied by no more than four families if the owner actually lives in the dwelling as his residence.<sup>12</sup>

The Act forges a broad arsenal of remedies for attacking violations. One remedy is initiated by filing a complaint with the Secretary of Housing and Urban Development, in which case the Secretary is to investigate the case and attempt administratively to remedy the violation.<sup>13</sup> The Act also creates a private civil remedy for redressing violations.<sup>14</sup> In the case of a pattern of resistance to the Act, the Attorney General has authority to invoke civil proceedings.<sup>15</sup> In sum, the Act and *Jones v. Mayer* mark a major extension in protecting civil rights in the crucible of a conflict with property rights; the protection which began in *Shelley v. Kraemer*,<sup>16</sup> in which the Supreme Court held that the courts could not be used to enforce property restrictions affecting civil rights, has been enlarged to wage a frontal attack on private discrimination in the sale or rental of housing.

## II. LANDLORD AND TENANT

*Retaking Possession Upon Default.* Upon default by the tenant, the landlord has, among other remedies, the right of re-entry and the right to take possession of the leased property. Such rights must, however, be exercised peaceably and without force or violence. But the problem of advising a landlord as to what measures of self-help may be taken after the tenant's default is a bit treacherous under Texas law. In *Gulf Oil Corporation v. Smithey*,<sup>17</sup> an oil company leased a service station to its dealer, agreed to supply him an inventory of gasoline and loaned him money for the purchase of equipment and merchandise for the operation of the station, the loan being evidenced by a note secured by a security agreement covering the equipment and merchandise. The lease agreement also provided that upon default the landlord could "re-enter and, in any lawful manner, resume possession of said premises." The security agree-

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<sup>11</sup> *Id.* § 3603(b)(1).

<sup>12</sup> *Id.* § 3603(b)(2).

<sup>13</sup> *Id.* § 3610(a).

<sup>14</sup> *Id.* § 3612(a). The remedy includes a permanent or temporary injunction or restraining order, the award of actual damages and not more than \$1,000 in punitive damages, and court costs and reasonable attorneys' fees. *Id.* § 3612(c).

<sup>15</sup> *Id.* § 3613. He may apply for a permanent or temporary injunction, restraining order "or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter." *Id.*

<sup>16</sup> 334 U.S. 1 (1958).

<sup>17</sup> 426 S.W.2d 262 (Tex. Civ. App. 1968), *error dismissed*.

ment permitted the secured party to take possession of the collateral and for such purpose to enter upon the premises and remove the collateral. Subsequently, the dealer defaulted under the lease and the oil company locked the station's gasoline pumps and then picked the lock on the service station in order to remove the equipment and merchandise. The dealer sued the oil company for damages for trespass and conversion. The court of civil appeals, acknowledging that the re-entry and repossession rights of a landlord are valid if exercised peaceably and without force or violence, held that "entry into the building by picking the lock was not peaceable but was by force and violence, and that the taking of the personal property under these circumstances was by force and violence, which is not permitted by the law."<sup>18</sup> The court stressed that the dealer was neither present during the retaking nor informed that the landlord intended to retake possession. This rationale has several difficulties. First, the right of re-entry and repossession was outlined in the lease and security agreement; thus, the tenant presumably knew of the landlord's right of re-entry and repossession. Second, since the lease required no notice of the exercise of such rights nor the presence of the tenant, these elements seem to be immaterial in determining whether the re-entry was peaceable. The central question is whether the act of picking the lock is peaceable and without violence or force. Certainly, such an act is a forcible entry, but it presents no violence or threat to the person, unless the tenant returns to the premises while the landlord is re-entering. Judicial review of the question of such a re-entry then should turn on whether the policy to be emphasized is that of protection of personal rights (*e.g.*, protecting against the *threat* of personal violence and injury) or of property rights. The court in *Smithey* exalted the protection of property rights, but the cases cited by the court in support of its decision suggest that the threat of personal violence is the paramount consideration.<sup>19</sup> In sum, *Smithey* further complicates the landlord's dilemma of whether to attempt to re-enter after a default. The dilemma is particularly aggravated when the tenant has abandoned the leased premises and the landlord is concerned about the security of the premises. In any event, the lesson of this case seems to be that the landlord should notify the tenant of the intention to re-enter and retake possession or the tenant must be present.

**Repairs.** A common practical problem in landlord-tenant relationships is the responsibility for repairs. The general rule in Texas is that the tenant

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<sup>18</sup> *Id.* at 265.

<sup>19</sup> *Watson v. Hernandez*, 374 S.W.2d 326 (Tex. Civ. App. 1963), *error dismissed* (defendant, in attempting to repossess a car, stopped plaintiff's car, told plaintiff to move over, to hand him the keys and to get out of the car); *Godwin v. Stanley*, 331 S.W.2d 341 (Tex. Civ. App. 1959), *error ref. n.r.e.* (defendant assaulted plaintiff in repossessing an accordeon); *Kuhn v. Palo Duro Corp.*, 151 S.W.2d 894 (Tex. Civ. App. 1941), *rev'd on other grounds*, 161 S.W.2d 778 (Tex. 1942) (landlord, brandishing pistol, ordered tenant off premises and began nailing up windows and doors).

*Smithey* also raises the related question of whether a landlord who retains a duplicate key (which is commonly the case) may use the key to re-enter after a default; the landlord's re-entry by picking the lock or by using a duplicate key would seem to make no substantive difference.

is responsible for repairs unless and to the extent the landlord has expressly assumed the responsibility. Several cases during the past year added to the already large corpus of case literature dealing with this problem. In *Perrone v. Kline*<sup>20</sup> a gas leak occurred under the paved parking area of the leased premises. The tenant viewed the leak as an emergency endangering the premises and his customers, caused the leak to be repaired, and sued the landlord for reimbursement. The lease required the landlord to maintain the roof, foundation and exterior walls of the building and *parking area*. The tenant was required to maintain the "interior of the building, including the plumbing, closets, pipes, and fixtures belonging thereto . . . and . . . [to] take good care of the property and its fixtures." The court of civil appeals held that the leaking gas pipe was "clearly within the definition of 'plumbing' and 'pipes and fixtures belonging thereto,'"<sup>21</sup> and the tenant was therefore responsible for the repairs.

In *McCrorry Corp. v. Nacol*<sup>22</sup> the tenant was sued for personal injuries resulting from the collapse of the front window of the building; the tenant sought contribution from the landlord because the lease required the landlord to maintain the "exterior of the building, including . . . structural members." The lease also required the tenant to notify the landlord of any needed repairs and gave the tenant the right to make such repairs if the landlord failed to do so and to deduct the cost from future rental installments. The court of civil appeals determined that the landlord and tenant intended to include the front window as a "structural member" of the building to be repaired by the landlord. However, the court iterated the doctrine that when the landlord who has covenanted to make repairs fails to do so and the tenant fails timely to notify the landlord of the needed repairs, the duty to make repairs is restored to the tenant. Thus, the landlord was relieved of any liability for the injury.

### III. MECHANICS' AND MATERIALMEN'S LIENS

*Retainage and Owner's Liability.* Under article 5469, a property owner is required to retain, until thirty days after construction work is completed, ten per cent of the "contract price to the owner, his agent, trustee, or receiver of such work."<sup>23</sup> Where the owner directly enters into more than one contract for the work, the question arises whether article 5469 creates a liability of (1) ten per cent of each separate contract as to laborers and materialmen under that particular contract, or (2) ten per cent of the total amount of all of the owner's contracts as to any laborer or materialman under any of the contracts. In *Hunt Developers, Inc. v. Western Steel Co.*,<sup>24</sup> decided in 1967, the Corpus Christi court of civil appeals held that the retainage requirement was ten per cent of all contracts with the

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<sup>20</sup> 425 S.W.2d 371 (Tex. Civ. App. 1968).

<sup>21</sup> *Id.* at 373. The court cited as definitional support TEX. REV. CIV. STAT. ANN. art. 6243-101, § 2(a) (1962).

<sup>22</sup> 428 S.W.2d 414 (Tex. Civ. App. 1968), *error ref. n.r.c.*

<sup>23</sup> TEX. REV. CIV. STAT. ANN. art. 5469 (1968).

<sup>24</sup> 409 S.W.2d 443 (Tex. Civ. App. 1966).

owner for the work. However, in *Lennox Industries, Inc. v. Phi Kappa Sigma Educational & Building Ass'n*,<sup>25</sup> the Austin court of civil appeals held that the retainage requirement applied separately to each contract with the owner. In *Lennox*, the owner entered into a general contract for the construction of an apartment house. The general contract did not cover air conditioning equipment, among other things, and the owner entered into a separate contract for the installation of air conditioning equipment. The installer failed to pay the manufacturer of the equipment, who filed a lien claim. The owner then contracted for the completion of the installation of air conditioning equipment, and the cost of completion exceeded the unpaid balance of the original air conditioning contract. The trial court held that the owner had the right to complete the work and apply the remaining contract funds to the cost of completion and that the materialman had no lien claim against the owner. The court of civil appeals reversed, holding that an owner who does not withhold the ten per cent retainage required by article 5469 is nevertheless liable in such amount to lien claimants. The court further held, however, that the ten per cent retainage applies only to the contract price of the air conditioning contract and not to the total of all contracts with the owner. The court observed that the 1961 amendment to article 5469, changing the language from "10% of the contract price of such building, fixtures or improvements" to "10% of the contract price to the owner," when read together with article 5452(2)(e), which declares that "there may be one or more original contractors," clearly requires "that the amount of required retainage is . . . measured by the contract price, one or more, to the owner."<sup>26</sup>

The statute does not define the phrase "contract price to the owner," and thus the meaning of this phrase is left to judicial construction. The construction in *Hunt* prevents an owner with several original contracts from protecting himself against lien claims in excess of ten per cent of a particular contract. Under each contract, the owner is required to make final payment to the contractor thirty days after completion of the work covered by that contract. The result in *Hunt* extends the owner's potential liability for lien claims to thirty days after *all* the work is completed. By this time, the owner likely will have paid a substantial portion of the retainages relating to portions of the work previously completed. The *Lennox* holding, in addition to reconciling portions of the mechanic's lien statutes, alleviates this problem.

*Priorities.* In *National Western Life Insurance Co. v. Acreman*<sup>27</sup> the purchaser of a tract of real property, prior to the time he purchased the property, entered into a contract with a road contractor for the construction of a road. During the construction period, the property was conveyed to the purchaser who obtained a land loan and granted a deed

<sup>25</sup> 430 S.W.2d 404 (Tex. Civ. App. 1968).

<sup>26</sup> *Id.* at 408.

<sup>27</sup> 425 S.W.2d 815 (Tex. 1968).

of trust lien on the property contemporaneously with the conveyance. A portion of the loan proceeds was withheld by the mortgagee in escrow to insure the purchaser's performance of the road construction contract. The purchaser failed to pay the road contractor, who sued on sworn account, and to establish and foreclose a mechanic's lien as prior to the deed of trust lien. The road contractor contended that by entering into the escrow agreement the mortgagee consented to the mechanic's lien and that such lien was superior to the deed of trust lien. The supreme court disagreed, stating that the mortgagee did not expressly consent to the mechanic's lien and that, in any event, "mere consent by a lienholder to creation of a second lien does not make the second lien superior."<sup>28</sup>

In another case<sup>29</sup> a lumber company furnished materials to a construction company for construction of improvements on city lots, making deliveries both before and after a deed of trust securing the construction loan was filed. The lumber company was not paid and sued for a money judgment and to establish its lien as prior to the deed of trust lien. Article 5459<sup>30</sup> provides in part that mechanic's liens have priority over all other liens except those "on the land or improvements at the time of inception" of the mechanic's lien. The supreme court, after reviewing the legislative and judicial history of the mechanic's lien statutes and with three justices dissenting, concluded that the lumber company's lien had its inception in the first deliveries of materials to the lots and that the lien should have priority to the extent of the full value of all materials furnished, whether before or after the recordation of the deed of trust. Chief Justice Calvert, the author of the majority opinion, observed that the mechanic's lien holder "has one lien securing the entire indebtedness as to each lot, not a series of liens securing separate debts. . . . The entire lien is made prior or secondary by the statute."<sup>31</sup> Justice Norvell, in dissent, concluded that the mechanic's lien should be superior only to the extent of the reasonable value of the materials delivered before the recordation of the deed of trust.<sup>32</sup>

*Removal of Improvements.* The courts have formulated the rule that a mechanic's lien holder may foreclose his lien, despite a prior deed of trust lien, if the improvements have not become permanently attached to the property and may be removed without material injury to the property. In *Parkdale State Bank v. McCord*<sup>33</sup> a supplier furnished component parts,

<sup>28</sup> *Id.* at 817.

<sup>29</sup> *University Sav. & Loan v. Security Lumber Co.*, 423 S.W.2d 287 (Tex. 1967).

<sup>30</sup> TEX. REV. CIV. STAT. ANN. art. 5459 (1958).

<sup>31</sup> *University Sav. & Loan v. Security Lumber Co.*, 423 S.W.2d 287, 296 (Tex. 1967).

<sup>32</sup> It seems noteworthy that the Chief Justice remarked that "the problem is primarily one of proper interpretation of the applicable statutes, not one of policy or of equities." *Id.* at 293. His opinion concluded, however, with the statement that "giving the lien priority is in accord with our long-standing rule of liberal construction for protection of laborers and materialmen who by their contribution added to the value of the security for the deed of trust debt." *Id.* at 296. Justice Norvell, on the other hand, commented that "in the absence of statutory wording compelling such result [the majority's holding] . . . the greater good lies with the security of land titles and the certainty of financial obligations." *Id.* at 297.

<sup>33</sup> 428 S.W.2d 121 (Tex. Civ. App. 1968), *error ref. n.r.e.*

including wall sections, window units, outside door units, roofs and wall sheeting for several buildings, all of which were installed on the concrete slab already in place. A prior deed of trust securing the construction loan had been filed of record. The owner of the property repudiated the agreement with the supplier, who then filed mechanic's lien affidavits. After a default under the construction loan, the deed of trust lien was foreclosed and the property sold by the trustee. Although admitting that the deed of trust lien had priority, the supplier sought to foreclose his mechanic's lien as to the improvements he supplied. The court of civil appeals allowed the supplier to foreclose his mechanic's lien on all of the building materials above the concrete foundation on the property. Although acknowledging that the evidence was conflicting as to whether or not such improvements could be removed without material injury to the property, the court concluded that the evidence was "legally and factually sufficient" to support the jury finding. To determine the "factual" sufficiency in light of the conflicting evidence the court relied chiefly on *Wallace Gin Co. v. Burton-Lingo Co.*,<sup>34</sup> in which a lumber company furnished materials for the construction of a cotton house on property having a gin and other separate improvements already constructed thereon; the lumber company was permitted to foreclose its lien and sell the cotton house, even though there was a prior deed of trust lien covering the property. However, application of *Wallace Gin Co.* to the facts in *Parkdale State Bank* seems questionable. The foreclosure and sale of a cotton house on property having substantial other improvements (particularly when the deed of trust was not given to secure a construction loan for the cotton house) would cause little or no material injury to the property (and thus the security for the loan). But the foreclosure and sale of the components of a building, leaving only the concrete foundation, on property covered by a deed of trust securing the construction loan for the building would seem materially to affect the value of the property.

*Time of Filing Claim.* In *General Air Conditioning Co. v. Third Ward Church of Christ*<sup>35</sup> a subcontractor filed a lien claim because the general contractor failed to pay for the work. The owner had promptly paid the general contractor upon completion of the work and thus failed to retain the ten per cent for thirty days as required by article 5469. The subcontractor gave the owner notice of the claim within thirty days after the work was completed (the time period under article 5469); however, the lien claim affidavit was not filed (and therefore the lien was not perfected) within the thirty-day period, but was filed within ninety days after the indebtedness accrued (the time period under article 5453). The supreme court held that because the owner did not retain the ten per cent lien claimant's fund as required by article 5469, the general article (article 5453) providing for a ninety-day filing period controlled. Thus the subcontractor was entitled to a recovery and a lien against the owner's

<sup>34</sup> 104 S.W.2d 891 (Tex. Civ. App. 1937).

<sup>35</sup> 426 S.W.2d 541 (Tex. 1968).



property to the extent of the ten per cent fund. The court appears to treat this result as self-evident, offering no explanation other than references to the statutory provisions. Article 5469 speaks to the circumstance in which the owner has failed to retain the ten per cent fund by nevertheless making the owner liable for ten per cent; but the article does not suggest that a different filing period is required in order to perfect the lien in the event the owner fails to retain the ten per cent fund. In this case, the result is perhaps justifiable in that the materialman gave notice to the owner within the thirty-day period; thus, if the owner had retained the ten per cent fund for thirty days the supplier would have been paid. If the courts will limit such a construction of article 5469 to these circumstances the current business practices in the construction industry will be only mildly affected. If such a construction is extended to include other circumstances (for example, where both the notice is given and the lien affidavit filed after the thirty-day period) dislocation would follow (not only to contractors and subcontractors, but also to lenders and title companies) and a prudent owner would withhold ten per cent for a full ninety days after the work is completed. In the example, it would make no difference if the owner withheld or paid the ten per cent fund during the thirty-day period since the notice and lien were filed after this period.

#### IV. PROPERTY DESCRIPTIONS

In contracting for the purchase and sale or lease of large tracts of undeveloped property, a survey or a metes and bounds description is often unavailable at the time the contract or lease is made. Frequently, time is of the essence in getting the documents executed, and little attention is paid to the accuracy of the property description. The case law in Texas is clear that the document must furnish within itself, or by reference to some other existing writing, the means or data by which the property may be identified with reasonable certainty. An incomplete description of the property, if accompanied by the use of such words as "my property," "my land," or "owned by me," is sufficient if the owner owns only one tract of property answering the description.<sup>36</sup>

The importance of an adequate property description is underscored in two recent civil appeals cases. In one,<sup>37</sup> a real estate broker obtained a written listing agreement for property described as "approximately 40 acres out of the Ritson-Morris Survey, in Harris County, Texas, adjacent to Wildwood Additions." A contract was entered into describing the property as 39 acres, more or less (being part of tracts originally containing 76.849 acres, describing the deed) out of the Ritson-Morris Survey, "lying west of the channel or slough opening into Clear Lake." Also included were a number of undeveloped lots in Wildwood Additions, "and all other right, title and interest of seller, whether now owned or hereafter acquired before the date of closing hereof, in and to land and im-

<sup>36</sup> See *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949).

<sup>37</sup> *Mauro v. Wildwood Co.*, 426 S.W.2d 322 (Tex. Civ. App. 1968), *error ref. n.r.e.*

provements located in the Ritson-Morris Survey . . . and lands lying adjacent to the lands described . . . above and underlying roads, easements and said channel or slough." Subsequently, a survey revealed that the property actually consisted of several tracts, including a 2.58-acre tract not adjoining Wildwood Addition. The contract was not consummated, and the broker sued for his commission. The court questioned whether or not the parties intended to include the 2.58-acre tract, the lots in Wildwood Addition, and all or only part of the tracts adjoining Wildwood Addition. The court concluded that the description was uncertain and indefinite and that "there was no manner in which the specific property to be sold could be determined in this case from the written listing agreement and from the property on the ground."<sup>38</sup>

In the other case<sup>39</sup> the owner employed a real estate salesman to sell tracts located in and near a town. A notice, signed by the owner and addressed "To All Salesmen," was delivered, setting forth the amount and manner of payment of the commission. The salesman sold tracts of property and sued for the commission. The owner contended, and the court held, that the suit was barred by section 28 of article 6573a,<sup>40</sup> which provides that no action may be maintained for recovery of any commission for the sale of real estate unless the agreement is in writing and signed by the party sought to be charged. The court observed that the notice was insufficient because it neither contained any description of the property nor referred to another writing containing a description of the property. The court acknowledged that the salesman was an employee and was employed to sell the owner's property exclusively, but remarked that it "would have to rewrite Sec. 28 of Article 6573a in order to include exceptions based on such facts."<sup>41</sup> No rewriting would have been required if the court had viewed the case merely as a suit to recover wages due an employee. The wages are measured by a percentage of the sales price of property sold by the employee and thus are parallel to a "commission" when an independent agent is involved. It would not seem that the policy of section 28, article 6573a is enhanced by covering the employer-employee context.

#### V. AD VALOREM TAXES

The Texas Supreme Court considered for the first time in many years the question of what types of charitable institutions are statutorily exempt from ad valorem taxes.<sup>42</sup> Hilltop Village, Inc., a non-profit corporation organized for the purpose of providing a home for older adults, filed a declaratory judgment suit, seeking an exemption from the ad valorem tax on the basis that it was a purely public charity. The bylaws of the home stipulate that there is no admission fee "but those who are financially able to pay for the cost of their care shall be expected to do so. . . .

<sup>38</sup> *Id.* at 327.

<sup>39</sup> *Jennings v. Lee*, 430 S.W.2d 236 (Tex. Civ. App. 1968), *error ref. n.r.e.*

<sup>40</sup> TEX. REV. CIV. STAT. ANN. art. 6573a, § 28 (1960).

<sup>41</sup> 430 S.W.2d at 239.

<sup>42</sup> *Hilltop Village, Inc. v. Kerrville Independent School Dist.*, 426 S.W.2d 943 (Tex. 1968).

In any case, admission will be a matter of negotiation and mutual agreement and each case will be considered on its own merit."<sup>43</sup> The bylaws further provide that, in cases where a member of the home is unable to pay for the cost of his care, the administration of the home has authority to apply for financial help or "may provide such member with funds . . . ."<sup>44</sup> The evidence showed that twenty-two per cent of the residents of the home received some charity in varying amounts and that the others paid for the full cost of their care. The home also operated a canteen, candy and cigarette vending machines, and a beauty shop, from which it received, at most, a nominal income. Despite the fact that the income from the residents was supplemented by voluntary contributions and donations, the home had operated at a substantial loss since its organization.

In reaching its decision, the supreme court concluded that in order for an institution to qualify for the statutory exemption, there must be a dedication of the property to charitable uses accompanied by actual uses for such purposes.<sup>45</sup> After finding no Texas case law precedents on this issue involving a home for the aged, the court examined cases from other states and discovered a conflict. The decisions recognizing the tax exemption, the court noted, rested principally upon the theory that elderly adults have special care and residential requirements, the alleviation of which is of social value. The decisions denying exemption emphasized that the elderly adults of the home were the principal beneficiaries, rather than society in general, and that society was not relieved of responsibility for such persons. The court stressed that the home's facilities were available primarily to those who are able to pay and that the home did not accept residents without a consideration of their financial circumstances. Moreover, the bylaws of the home did not bind the home to accept charitable obligations or to engage in dispensing relief to those in need. The court concluded:

[T]he requisite elements of dedication and use in fact of its properties are not present. There is no assurance that society is being or will be relieved of the care and expense of those in need. This is not to say that all residents must be indigent or that the acceptance of payment from some will defeat tax exemption. It is to say that the institution must be one whose properties and assets are pledged in perpetuity to the relief of persons in financial need and to their assistance in obtaining the care they must have to prevent their becoming a burden to society.<sup>46</sup>

Justices Pope and Norvell dissented, observing that the charter of the home "dedicates all of the property and funds of the home to charitable purposes from inception until final distribution upon the dissolution of the corporation."<sup>47</sup> The dissenters noted that, if the bylaws lacked a dedication to charitable purposes, such a defect easily could have been cured by amendments to the charter and bylaws to provide for such dedication.

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<sup>43</sup> *Id.* at 945.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 949.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

The dissenters noted that in *Santa Rosa Infirmary v. City of San Antonio*,<sup>48</sup> which the majority had relied upon as the Texas case establishing the guidelines, fourteen per cent of the patients of the hospital were charity patients; moreover, the hospital made a profit but used the profit for further services, whereas the home in *Hilltop* made no profit and twenty-two per cent of its members were charity cases.

## VI. EASEMENTS AND DEDICATIONS

*Lateral Support for Easement.* In *San Jacinto Sand Co. v. Southwestern Bell Telephone Co.*<sup>49</sup> the telephone company secured an easement thirty feet in width and laid two eight-inch pipes for cables beneath the easement area. The telephone company then began laying a new twelve-inch inter-city cable that would result in discontinuing the use of the two eight-inch pipes. A sand and gravel company, which owned the land adjoining the easement, was excavating sand and gravel on another tract of land nearby and began preparing the adjoining tract for excavations. The telephone company sued for a temporary injunction prohibiting excavations resulting in damage to the cables and for a declaration of its rights to lateral and/or subjacent support respecting its easement. The trial court granted the application for the temporary injunction and prescribed the boundaries within which no excavation could be conducted. The court of civil appeals held that the language in the grant of easement authorizing the telephone company to reconstruct or rerun cables as it required from time to time permitted the installation of the larger pipe.<sup>50</sup> The court admitted that granting relief to either party would cause the other to suffer loss, but concluded that "the equities and legal rights of the parties are clear."<sup>51</sup>

In determining equitable rights, the court emphasized the vital role played by the transportation and communications systems and their dependence upon the "integrity" of easements. Although this tribute to the communications and transportation systems seems beside the point in resolving the case, it illustrates the court's sensitivity to the interest of the public under such circumstances (for example, the higher costs of installing an alternative cable line would mean ultimately higher tariffs for users).

*Abandonment of Prior Dedication.* In a time of spiraling land values, property developers frequently seek to transform the use of property from

<sup>48</sup> 259 S.W. 926 (Tex. Comm'n App. 1924), judgment adopted.

<sup>49</sup> 426 S.W.2d 338 (Tex. Civ. App. 1968), error ref. n.r.e.

<sup>50</sup> The court thus distinguished this case from *Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662 (Tex. 1964), in which the grant of easement deleted the word "remove" from its enumeration of the rights of the easement holder.

<sup>51</sup> 426 S.W.2d at 345. As to the equitable rights, the court remarked that "the tremendous transportation and communications system servicing the state are dependent upon the integrity of these easements. Many of the streets, roads and highways of the state are built on easements. The distribution of electric power is dependent upon easements as is practically all telephone service. Pipelines and railroads generally rely entirely on easements. Under the view taken by appellant, these interests in land would be potentially reduced to mere licenses at will." *Id.*

low density housing to higher density housing, either by changing the zoning classification or by securing the abandonment of a prior dedication. Demonstrating the abandonment of a prior dedication has generally been a difficult task. In *Smith v. Williams*<sup>52</sup> the owners of several lots within a subdivision were threatened by the construction of apartments on nearby property and sought a declaratory judgment that single-family residential restrictions imposed by a 1946 dedication of an addition were still in force. The original plat and dedication of the addition provided for thirty-six large lots, imposed restrictions as to floor space and cost, and required the dedicators' approval of any structures. From time to time, various of the lots comprising the original addition were subdivided and rededicated so as to increase the number of lots. A portion of one lot was conveyed by deed in which the grantor waived the restrictions imposed by the original dedication. This portion was later rezoned for apartment use and was then rededicated for use either for single-family residential or apartment purposes. However, many of the persons who were then owners of lots comprising the original addition did not join in the rededication. The supreme court held that the subsequent rededications<sup>53</sup> "completely emasculated" the original dedication.

#### VII. WARRANTIES IN CONSTRUCTION

The question of the applicability of the doctrine of *caveat emptor* to the construction and sale of buildings was considered by the supreme court in *Humber v. Morton*.<sup>54</sup> After the owner purchased a new house from a builder-seller, the house caught fire and partially burned, allegedly because of a defectively constructed fireplace. The house was sold with no express warranties except as to title. The supreme court held that a builder-seller impliedly warrants that the house "was constructed in a good workmanlike manner and was suitable for human habitation."<sup>55</sup> After a thorough review of the national pattern of "the rapid sickening of the *caveat emptor* doctrine,"<sup>56</sup> the court concluded that the doctrine as applied to new houses is an anachronism. It thus appears that Texas has finally fallen in line with other states in further eroding the *caveat emptor* doctrine.

In *Humber*, the court reviewed a Colorado case<sup>57</sup> in which the builder-

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<sup>52</sup> 422 S.W.2d 168 (Tex. 1967).

<sup>53</sup> The court observed that the other rededications, although not shifting from single-family residential to apartment use, substantially departed from the original plan. The court specifically noted the following changes: the number of lots was increased from 66 to 640; the minimum cost requirement was abandoned; and street locations and easements were changed. From these facts, the court observed, "it is reasonable to conclude that those who executed each rededication intended to abandon the 1946 (original) dedication as to the property then rededicated and to waive any right to enforce its restrictions . . ." *Id.* at 173. Another condition in the original dedication prohibited the sale of lots to anyone not of the white race. The court stated in a footnote: "As to the enforceability of this restriction, see *Shelley v. Kramer*, 334 U.S. 1." *Id.* at 173 n.2.

<sup>54</sup> 426 S.W.2d 554 (Tex. 1968).

<sup>55</sup> 426 S.W.2d at 555.

<sup>56</sup> *Id.* at 558.

<sup>57</sup> *Carpenter v. Donahoe*, 154 Colo. 78, 388 P.2d 399 (1964).

seller contracted to sell the house after the construction was complete. The court remarked that "while it is not necessary for us to pass upon a situation in which the vendor-purchaser relationship is absent, the [Colorado] case . . . is important as much of the reasoning set forth in the opinion is applicable here."<sup>58</sup> A Texas court of civil appeals in *Polk Terrace Inc. v. Curtis*,<sup>59</sup> however, indicated that there is no warranty of fitness and suitability in the sale of a house. Since *Polk* apparently did not involve a builder-seller, it remains to be seen whether or not the implied warranty will be extended to subsequent sales of improved property.

In another warranty case,<sup>60</sup> a court of civil appeals was called on to determine whether or not the typical one-year contractual warranty precluded recovery for latent defects which did not appear within the one-year period. The city of Midland sued a general contractor and surety company to recover damages for breach of contract for the construction of a swimming pool. The contract incorporated the A.I.A. Standard Contract Documents, providing that the contractor guarantees the work for one year from the date of acceptance and further that the architect's certificate of completion does not relieve the contractor of his express warranties nor his duty to correct defective work. The general conditions also delegate to the architect the final authority to decide all questions as to the quality and acceptability of the material furnished and work performed. Approximately twenty months after the pool was completed and a certificate of acceptance signed by the city's architect, defects due to faulty construction of the pool were discovered. Recognizing the conflict between the provisions of the general conditions, the supreme court held:

[L]atent defects at the time the architect issued his final certificate of payment and accepted his premises, becoming evident after the one-year warranty contained in the contract and which could not have been discovered by the exercise of ordinary care, may be made the basis of a suit for damages on account of such defects. . . . The architect's final certificate is binding on all parties as to the actual physical final completion of the work. . . . Insofar as defects are concerned which are unknown and could not have been discovered by ordinary care, the four-year statute of limitations applies.<sup>61</sup>

Thus, a contractor who thought he had given a one-year warranty discovered a latent defect in his contract extending his warranty to four years.

### VIII. EMINENT DOMAIN

The recent development of the Texas law of eminent domain certainly must be described as "evolutionary" rather than "revolutionary." No startling concepts were introduced, and the cases serve largely as reminders of previously established legal principles.

Only two supreme court decisions are worthy of note, *State v. Zaruba*<sup>62</sup>

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<sup>58</sup> 426 S.W.2d at 559.

<sup>59</sup> 422 S.W.2d 603 (Tex. Civ. App. 1967), *error ref. n.r.e.*

<sup>60</sup> City of Midland v. Waller, 430 S.W.2d 473 (Tex. 1968).

<sup>61</sup> *Id.* at 478.

<sup>62</sup> 418 S.W.2d 499 (Tex. 1967).

and *Brunson v. State*.<sup>63</sup> *Zaruba* reminds the condemnee and his attorneys that, when land occupied for business purposes is taken, the damage to the established business or "good will" is not compensable as a separate, independent item of recovery. The court held that the condemnee had obviously included the value of his business as a "going concern" in valuing the whole of his property before the taking; since his opinion was founded on an improper measure of valuation, it was of no probative force and could not support the jury finding of damages to the remainder. *Brunson* arose out of the taking of an easement for highway right-of-way purposes. The state sued for conversion of a trailer house and other improvements which were located on the right-of-way at the time of the condemnation judgment but subsequently removed by the condemnee. The condemnation judgment was silent as to the disposition of the improvements, and the court held that in such a case "the ownership of the landowner in improvements which are a part of the realty, and his right to remove them, will be enforced."<sup>64</sup>

Two decisions by courts of civil appeals further eroded the doctrine announced in *Tennessee Gas & Transmission Co. v. Zirjacks*<sup>65</sup> that one seeking damages to the remainder must show the nature of the damage and its relationship to value. Lip service is paid to the principle of *Zirjacks*, but the effect of *City of Houston v. McFadden*<sup>66</sup> and *Southwestern Bell Telephone Co. v. Griffin*<sup>67</sup> is to minimize the importance of a witness's being able to pinpoint the "how" and "why" of damages to the remainder in the sense of explaining the dollar value attached to the damages allegedly caused by the taking.

*Tarrant County Water Control & Improvement District No. 1 v. Hubbard*<sup>68</sup> reminds the condemnor to plead enhancement of value as a result of special benefit from the taking as an offset to damages to the remainder (but, of course, never as a reduction in value of the part actually taken). The court of civil appeals upheld the trial court's refusal to permit the condemnor to file a trial amendment asserting special enhancement.

Two cases on valuation are worth reading as examples of the degree to which the appellate courts will go to support the trial court's findings of value. In *Brazos River Authority v. Gilliam*,<sup>69</sup> the court upheld a substantial award for ranch land valued as gravel land over the condemnor's

<sup>63</sup> 418 S.W.2d 504 (Tex. 1967).

<sup>64</sup> *Id.* at 507.

<sup>65</sup> 244 S.W.2d 837 (Tex. Civ. App. 1951), *error dismissed*.

<sup>66</sup> 420 S.W.2d 811 (Tex. Civ. App. 1968), *error ref. n.r.e.* *McFadden* involved damages arising out of low-flying jets; the landowner's expert witness depreciated the value of the property by fifty per cent but gave no specific reasons "how" and "why." The court concluded, "It is not for this court to discredit Mr. Weiss' testimony because he failed to give detailed reasons for his conclusions . . ." 420 S.W.2d at 815.

<sup>67</sup> 429 S.W.2d 576 (Tex. Civ. App. 1968). In *Griffin* the court followed *State v. Scarbrough*, 383 S.W.2d 839 (Tex. Civ. App. 1964), *error ref.*, and *McFadden* and distinguished *Zirjacks*. The court pointed out that, if there is probative evidence of specific ways in which the remainder is damaged, the testimony of the expert witness as to value "before" and "after" need not go into detailed reasons to support the opinion of value.

<sup>68</sup> 426 S.W.2d 330 (Tex. Civ. App. 1968).

<sup>69</sup> 429 S.W.2d 949 (Tex. Civ. App. 1968).

contention that the *Cannizzo*<sup>70</sup> doctrine should apply. It was undisputed that no gravel operations had ever been conducted and there was no evidence that such operations would be conducted within a reasonable time. The court held that sand and gravel underlying condemned land partakes of the nature of realty and that evidence of its value is proper without regard to plans for mining or use. The principle is no doubt correct, but its application to the facts of this case is a little dubious.

*State v. Walker*<sup>71</sup> is a classic example of how the state (and hence the taxpayers) sometimes "gets it coming and going." Here the property taken was a strip 50 feet by 180 feet off the front of a tract 150 feet by 180 feet. The Texarkana court of civil appeals upheld the trial court's judgment of \$47,652 for the 9,000 square feet taken and simultaneously upheld a finding that the remaining 18,000 square feet had a value after the taking of only \$30,500 (and thus awarded \$18,850 for damages to the remainder). The court advanced the following rationale for the seemingly large award on the part taken: "Such facts are self evident that a willing buyer would pay more per square foot of the land fronting on the highway . . . ."<sup>72</sup> This assertion is correct but the court overlooked the same "self-evident" fact that after the front one-third is severed the property behind it becomes frontage, and thus special enhancement to the remainder would seem to have appeared almost as a matter of law. Perhaps the state failed to plead enhancement.

Three more rounds of the *Dupuy*<sup>73</sup> and *Archenbold*<sup>74</sup> cases unfolded and it appears that a veritable flood of cases in this area can be expected. Two cases followed *Dupuy* and held that reasonable access had been impaired by public works activity not involving direct physical taking of or injury to the property.<sup>75</sup> In the most significant case, *City of Houston v. Fox*,<sup>76</sup> the majority held that the owner had a private easement over abutting streets and that "construction of the improvement for public use substantially impaired his right to make use of these private easements. This is a violation of a legal right distinct from the claimed denial of the right to ingress and egress."<sup>77</sup> Since the Texas Supreme Court had already reversed and remanded the case, holding as a matter of law that reasonable access had not been impaired,<sup>78</sup> it appears likely that the case will be reviewed and the outcome should be interesting.

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<sup>70</sup> *City of Austin v. Cannizzo*, 153 Tex. 324, 267 S.W.2d 808 (1954).

<sup>71</sup> 430 S.W.2d 13 (Tex. Civ. App. 1968), *error granted*.

<sup>72</sup> *Id.* at 17.

<sup>73</sup> *Dupuy v. City of Waco*, 396 S.W.2d 102 (Tex. 1965).

<sup>74</sup> *Archenbold Auto Supply Co. v. City of Waco*, 396 S.W.2d 111 (Tex. 1965).

<sup>75</sup> *City of Waco v. Taxland Corp.*, 425 S.W.2d 374 (Tex. Civ. App. 1968), *error granted*.

<sup>76</sup> 429 S.W.2d 201 (Tex. Civ. App. 1968), *error granted*.

<sup>77</sup> *Id.* at 204.

<sup>78</sup> *City of Houston v. Fox*, 419 S.W.2d 819 (Tex. 1967).